NO. 88-2015

Supreme Court, U.S.
FILED
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In the
Supreme Court of the United States

OCTOBER TERM, 1988

OLYMPIA ROOFING COMPANY, AND OLYMPIA COMPANY, INC., ET AL
Petitioners

v.

THE CELOTEX CORPORATION, STANDARD-TAYLOR INDUSTRIES, INC., STANDARD ROOFING COMPANY OF NEW ORLEANS, INC., ROBBINS TAYLOR, AND PIERRE F. CARRIERE, ET AL
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-3850

USDC #CA 76-373-A

ORIGINAL PETITION FOR WRIT OF CERTIORARI

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Petitioners

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QUESTIONS PRESENTED FOR REVIEW

1. Did judiciary and/or its personnel, acting under color of Federal law, violate plaintiff-appellants' Fourth Amendment right to be free from unreasonable seraches and seizures in failing to return wrongfully retained property represented by 5 boxes of exhibits marked and sealed as confidential and subject to Protective Orders?

(a) Some Exhibits were obtained pursuant to discovery processes. Exhibits consisted of both corporate and personnal records. Personal records are protected under the Fifth Amendment and must be returned to plaintiff-appellants.

(b) Question and issue whether information obtained, (or mental impressions retained by viewer), from judicial invasion and inspection of 5 boxes of exhibits contrary to Protective Orders should be suppressed as fruit of the poisonus tree, should have been submitted to a hearing if judiciary intended to use information obtained from inspection of 5 exhibit boxes in reaching their order and reasons for judgment.

2. Doctrine of anomalous jurisdiction is based on Court's inherent power to police the actions of officers of the Court. This principle of equity requires a showing of callous disregard by the Court for constitutional rights. It is urged that retention of exhibits by the Court for 9 years without releasing, or submitting, the contents of the 5 boxes for inspection by plaintiff-appellants and their counsel is a forbidden burden on constitutional rights and privileges.

3. Where constitutional guaranties have been violated, was imposition on plaintiffs and their attorney of record double costs, penalties and sanctions an unconscionable levy and an abuse of judicial propriety and discretion?

LIST OF PARTIES

Pursuant to Supreme Court Rules 21.1(b) and 28.1, counsel for the Petitioners certifies that the following list of persons or corporations either have an interest in the outcome of this case or were parties to the proceeding in the Court whose judgment is sought to be reviewed.

Petitioners/Plaintiffs/Appellants

1. Olympia Company, Inc.
2. Olympia Roofing Company

Non-Party/Petitioners' Counsel

3. W. J. Manion

Respondents/Defendants/Appellees

4. The Celotex Corporation
5. Standard-Taylor Industries, Inc.
6. Standard Roofing Company of New Orleans, Inc.
7. Robbins Taylor
8. Pierre F. Carriere

OTHERS

9. Johns-Manville Sales Corporation
10. Clerk, U.S. Civil District Court, Eastern District of La.
11. Clerk, U. S. Court of Appeals for the Fifth Circuit
12. Hon. Charles Schwartz, Jr.
13. Jack N. Price

W. J. MANION,
individually and attorney of record for Olympa Roofing Company, Olympia Company, Inc., Petitioners/Plaintiffs/ Appellants
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I.

The petitioners, Olympia Company, Inc., Olympia Roofing Company, and their undersigned counsel, W. J. Manion, respectfully pray that a Writ of Certiorari issue to review the final order of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceedings on March 1, 1989 (Appendix E).

JUDGMENTS AND OPINIONS BELOW

Motion and Order for New Trial and Recall of Sanctions and Penalties was filed February 2, 1989, bearing No. 84-3850, United States Court of Appeals for the Fifth Circuit, which Motion and Order was denied March 1, 1989 (Appendix E), thereby denying any reconsideration of that Court's judgment dated September 23, 1985 (Appendix B), designating said petition to be frivolous with sanctions and penalties against plaintiffs and their attorney of record on appeal.

JURISDICTION
(S.Ct. Rule 15; 12.3)

The following statutes and constitutional guaranties set forth the jurisdiction necessary to lodge this Writ of Certiorari:

28 U.S.C.A. 1254 (1)
28 U.S.C.A. 1331 (Federal Question)
28 U.S.C.A 2101 (C)
U.S.C.A Const. Amend. 4, 5
U.S.C.A. Const. Amend. 14 (Scope of restrictions on powers of State are embodied by analogy in U.S.C.A. Const. Amend 5)
Doctrine of Anomalous Jurisdiction

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

(a) *Fifth Amendment, United States Constitution:*

No persons shall..."be deprived of life, liberty or property without due process of law...'.

(b) *Fourth Amendment, United States Constitution:*

The right..."to be secure...against unreasonable searches and seizure".

(c) *Fourteenth Amendment, United States Constitution:*

No State shall deprive any person of life, liberty or property without due process of law..."and equal protection of the law". (Extended by analogy to Federal action protected by U.S.C. Const. Amend. 5)

STATEMENT OF THE CASE

Antitrust violations were alleged against the Celotex Corporation ("Celotex"), Standard Roofing Company of New Orleans, Inc. and Standard-Taylor Industries, Inc. (collectively referred to as "Standard"), Robbins Taylor ("Taylor") and Pierre F. Carriere ("Carriere"), and suit was filed on February 5, 1976 in United States District Court, Eastern District of Louisiana, bearing Civil Action No. 76-373-A (hereinafter designated as "76-373A", Honorable Charles Schwartz, Jr., presiding Judge.

All discovered material were designated. "Confidential," subject to Protective Orders. On August 16, 1979 (Docket #186), Judge ordered that plaintiffs file in the record a copy of any and all exhibits referred to in plain-

tiffs' statement of the case. That was impossible if confidentiality was to be preserved and protected.

On December 15, 1979, W. J. Manion, Olympia's counsel ("Mr. Manion"), placed all discovered exhibits,not subject to summons, and countervailing affidavits in 5 sealed boxes in registry of District Court (Docket Entry 200 & 207), subject to Protective Orders allowing for noticed inspection of contents of said 5 boxes in camera only.

Many of these aforsaid exhibits were discovered from Johns-Manville Sales Corporation ("J/M"), who ultimately went into bankruptcy, and automatic stay order was never petitioned.

None of the exhibits in the 5 boxes were ever entered into evidence, yet defendants used them to support their Motion for Summary Judgment.

Summary Judgment was granted defendants. Upon substitution of plaintiffs' counsel for appeal, the 5 exhibit boxes were not available for inspection or appellate brief preparation, resulting in submittal of a sub-standard brief by plaintiff-appellants, which incurred double cost, penalties and sanctions dated September 23, 1985. Subsequent thereto, Olympia sued Jack N. Price for legal malpractice.

Mr. Manion frequently requested return of all boxes and pleadings, to no avail. On June 10, 1987, Mr. Manion paid two (2) fees to retrieve records from federal warehouse storage in Ft. Worth, TX. Upon receipt of that retrieval, the 5 impounded boxes were missing. Deputy Clerk of District Court made numerous searches, without result.

When faced with a Writ of Mandamus demanding surrender of 5 boxes on October 12, 1988, those boxes were found to have been stored in U.S. Custom House, New

Orleans, Louisiana. When produced, the seals of the boxes were broken, and some documents were in disarray and misplaced.

From the foregoing facts, Mr. Manion was denied access to 5 boxes to properly prepare an appeal to rebut and resist Summary Judgment. It is unconscionable to assess sanctions and penalties when the Courts frustrated many requests to return Olympia's and Mr. Manion's property and documents that Mr. Manion was personably responsible for under the Protective Orders.

We are talking about 9 years of concealment. Under these circumstances, all judgments, orders, sanctions and penalties should be recalled and litigation re-opened to complete discovery necessary for trial. Res judicata does not attach with ill practices invalidating constitutional guaranties.

Prescription can be addressed in time only from the date the 5 boxes were returned to Mr. Manion, which occurred in October, 1988.

In summation, it is hard to believe that personnel in both offices of the Clerk of Court could be a party to such conduct; whether their defense is that they responded to direct orders from others unknown is not the direction and intention of this brief. It will suffice to state that abuse of legally protected rights and interests of Olympia and Mr. Manion have occurred which requires a judicial remedy.

REASON FOR GRANTING THE WRIT

Any request by plaintiffs for return or inspection of records allegedly retained (lost) by judiciary in violation of Fourth Amendment is based on the constitutional guarantee and right to be free from unreasonable searches and seizures. *Linn v. Chivatero,* 714 F.2d 1278 (5 Cir. 1983)

Even after the 5 boxes were produced by Clerk of District Court, District Judge demanded that these boxes be returned to him within 21 days of release (Appendix D). This demand runs counter to Local Rule 8.2 of District Court which requires removal of all exhibits within 30 days of final disposition of the case; if not removed, then the exhibits may be destroyed or otherwise disposed of by the Clerk of Court.

Fifth Circuuit has held that cause of action arising under the Fifth Amendment protection relates to action by the Federal government and not state officials or private persons. However, the problem of stigmatization addressed in 14th Amendment violation by State Action of Louisiana Judges which affects liberty interest of plaintiffs and Mr. Manion are protected by analogy under the due process guaranties of the 5th Amendment. *Rutherford v. United States*, 702 F.2d 580 (5 Cir. 1983)

The Court has inherent power to police the actions of officers of the Court and are seriously concerned with any callous disregard for constitutional rights. *Richey v. Smith*, 515 F.2d 1239, 1243 (5 Cir. 1975); *Manson v. Pulliam*, 402 F.Supp. 978, 980 (USDC, ND, Ga 1975)

Absence of records and exhibits necessary to perfect appellants' brief requires remand for trial, and any fault relative to those missing exhibits is not imputable to the plaintiff-appellants after December 15, 1979. *Versailles Arms Apts. v. Granderson*, 377 So.2d 1359 (La.App. 4 Cir. 1979); *Guillie v. Dept. of Transp. & Dev.*, 538 So.2d 1144 (La.App. 5 Cir. 1989); La. C.C.P., art. 2132, 2161

CONCLUSION

Drawing on the authorities cited herein, Writ of Certiorari should be granted.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing original brief of petitioners has this _____ day of _____, 1989 been mailed to interested parties and counsel of record.

_____

W. J. MANION

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
NOV 15, 1984

OLYMPIA COMPANY, INC. ET AL — Civil Action
VERSUS — No. 76-373
THE CELOTEX CORPORATION ET AL — Section "A"

J U D G M E N T

Considering the written reasons on file herein, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of defendants Celotex Corporation, Standard-Taylor Industries, Inc., Standard Roofing Company of New Orleans, Inc., Robbins Taylor, and Pierre F. Carriere, and against plaintiffs Olympia Company, Inc. and Olympia Roofing Company, Inc., dismissing plaintiffs suit with prejudice, plaintiffs to bear all costs.

New Orleans, Louisiana, this 15th day of November, 1984.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ illegible
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
NOV 9, 1984

OLYMPIA COMPANY, INC. and OLYMPIA ROOFING COMPANY, INC. — Civil Action

VS. — No. 76-373

THE CELOTEX CORPORATION, STANDARD-TAYLOR INDUSTRIES, INC. ET AL. — Section "A"

ORDER AND REASONS

This matter came before the Court on the motion of defendant Celotex Corporation (Celotex) and the motion of defendants, Standard-Taylor Industries, Inc. and related entities and persons (Standard)[1] for summary judgment. Following oral argument, the motions were taken under submission. Having considered the memoranda, the record and the law applicable to this motion, the Court grants the motions of defendants for the following reasons.

I. Course of the Litigation

Plaintiffs, Olympia Company and Olympia Roofing Co., Inc. (hereinafter jointly referred to as Olympia) instituted this litigation in 1976, alleging, inter alia, various violations of the antitrust laws. The subsequent course of this litigation, as is evidenced by the voluminous record, involved extensive discovery, several amendments to

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[1] In Plaintiffs' Fourth Amended Complaint, (Record (R.) Vol. X, Document (D.) 218), superseding all prior pleadings of plaintiffs, the following defendants were named: (1) The Celotex Corporation, (2) Standard-Taylor Industries, Inc., (3) Standard Roofing Company of New Orleans, Inc., (4) Robbins Taylor, and (5) Pierre F. Carriere. All of the defendants, with the exception of Celotex, are hereinafter sometimes referred to jointly and collectively as "Standard."

plaintiffs' complaint, substitutions of counsel for plaintiffs, and numerous extensions of cut-off dates, continuances and the like, granted at the instance of plaintiffs. In late 1979, defendants Celotex and Standard filed motions for summary judgment, seeking dismissal of the action. However, prior to the hearing on those motions, the Court was apprised of plaintiffs' intention to again substitute counsel. The Court allowed the substitution, In order to afford plaintiffs' latest counsel an opportunity to develop the necessary facts, the Court also ordered that the pending motions for summary judgment be continued indefinitely.[2]

By an Order of the Court, plaintiffs then filed their Fourth Amended Complaint, which superseded all prior pleadings of plaintiffs.[3] As the result of a status conference held on May 14, 1980, the Court entered an Order, setting forth the manner in which this case was to further proceed, and requiring plaintiffs to file a Pretrial Statement which would thoroughly set forth plaintiffs' case and the factual and evidentiary basis for same.[4] Specifically, plaintiffs were directed to articulate their claims, by setting forth "in simple, declarative sentences all material facts relied upon by Plaintiffs in support of their claims for relief. . . " The Court directed that the "Pretrial Statements shall serve as each parties' contribution to the Pretrial Order, " and specified that "[a]ny factual contention, legal contention, any claim for relief or defense in whole or in part, or affirmative matter not set forth in detail as provided hereinabove shall be deemed abandoned, uncon-

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[2] In a Minute Entry of January 4, 1980, the Court noted that it was "of the opinion that [plaintiffs' counsel's] entrance in the case [would] result in a narrowing and clarifying of the issues and [would] in all probability obviate the necessity of hearing all of the contentions set forth in the motions for summary judgment." R. Vol. X, D. 211.

[3] R. Vol. S, D. 212, 218, 219 and 220.

[4] R. Vol. X, D. 221.

troverted, or withdrawn, notwithstanding the contentions of any pleadings or other papers previously filed herein. The case shall be tried upon the Pretrial Statements." Finally, the Court provided that ::[i]n the event defendants choose to do so, they may admit Plaintiffs' narrative facts relating to a legal contention or contentions for purpose of a Motion for Summary Judgment or Partial Summary Judgment. Any such Motion will be heard in accordance with the Federal Rules of Civil Procedure and the Local Rules of this Court, except that the narrative statements of fact in the parties' Pretrial Statements shall serve as the Statements of Material Facts required by Local Rule 3.9."[5] Furthermore, plaintiffs were allowed to take additional discovery subject only to the restriction that such discovery not be duplicative. Plaintiffs' Pretrial Statement, although it was filed approximately six months after the deadline set by the Court for its filing, was accepted by the Court.[6] Thereafter, the voluntary dismissal of certain of plaintiffs' claims and the motions of defendants to strike necessitated amendments to the plaintiffs' Pretrial Statement.[7] In its final form, Plaintiffs' factual contentions are set forth in their Second Amended Pretrial Statement. In response to the motions of defendants for summary judgment, plaintiffs filed into the record a letter of counsel, stating that "the pretrial statement contains both

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[5] R. Vol. X D. 221, Order of May 14, 1980, ¶¶ 25, 26, 37-39.

[6] Defendants filed motions to dismiss in May of 1982 based upon the failure of plaintiffs to comply with the Court's Order in this regard. On August 10, 1982, one day prior to the scheduled hearing date on those motions, plaintiffs filed the Pretrial Statement.

[7] R. Vol. XII-XIII, D. 282-298.

the facts and law on which Plaintiffs must rely." the motions were fixed for hearing on a date approximately two weeks prior to the pretrial conference and two days prior to the expiration of the discovery deadline set by the Court.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary judgment as a matter of law." Rule 56(c), Fed. Rules Civ. Proc. When a motion for summary judgment is made and supported in the manner provided in Rule 56(e) of the Federal Rules of Civil Procedure, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), Fed. Rules Civ. Proc.

The Court is not unmindful of the Fifth Circuit's admonition to approach summary judgment with caution, particularly with respect to anti-trust litigation. *Transource International, Inc. v. Trinity Industries, Inc.*, 725 F.2d 274, 279 (5th Cir. 1984). Nonetheless, summary judgment is sometimes appropriate in anti-trust actions. "It is now established that 'simply because a suit is brought under the antitrust laws does not foreclose a summary judgment.'" *Transource International, Inc. v. Trinity Industries, Inc.*, 725 F.2d 275, 279, quoting *In re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 440 (5th Cir. 1982), citing *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1112 (5th Cir. 1979).

Despite the long and arduous course of this litigation, despite every reasonable opportunity afforded the plaintiffs to discover triable issues of fact, and despite the

Court's many efforts to ensure that plaintiffs' alleged grievances, if proved, would be redressed, the Court finds that defendants are entitled to summary judgment, based upon the uncontroverted evidence and the law applicable to this case.

II. Motion of Celotex for Summary Judgment

A. The Facts

For the purpose of this motion, Celotex has admitted all of the narrative statements of fact in plaintiffs' Second Amended Pretrial Statement, except for those which Olympia admits have no factual basis or support and which have been conclusively refuted with sworn testimony based upon personal knowledge. The narrative statements of fact are incorporated herein by reference and are attached hereto as Appendix I. Additionally, Celotex has submitted other facts which are uncontested and which may be material. These are contained in Celotex's Rule 3.9 Statement are supported by the evidence and have not been rebutted or controverted by plaintiffs in the manner provided under rule 56(e). Thus, the Court accepts these facts as undisputed.

Based upon plaintiffs' narrative statement of facts and the record herein, Olympia's contentions may be summarized as follows. Olympia competed with Standard and other similar companies in securing roofing jobs and furnishing roofing services within the New Orleans area. In doing so, Olympia purchased roofing materials from Celotex or its business predecessors. For several years, Olympia was on Celotex's Approved Roofers list. This, based upon the uncontroverted evidence, enabled Olympia to secure a Celotex roofing bond covering any roof that (1) was installed and repaired by an approved roofer (2) using Celotex materials (3) in accordance with Celotex's publish

ed specifications. Roofing bonds are significant in the context of this case for two reasons. First, Olympia was a union roofing contractor.[8] Architectural specifications control whether a roofing job must be performaed with union labor and whether a roofing bond will be required. According to Olympia, these specifications provide that virtually all large commercial roofing jobs ($250,000 and over) must be bonded and applied by union roofers. Accordingly, Olympia contends that the ability to secure a bond was indispensible to a union roofing contractor in securing such jobs. Second, when Celotex's competitors reduced their bond coverage for unspecified reasons, Celotex "became possessed of a unique bond program," and was, thus, able to achieve a significant share of the market for "sale of roofing materials to bonded union roofing contractors" in the Greater New Orleans Area "because of its unique bonding program."[9]

According to Olympia, Celotex thereby obtained a "dominant and monopolistic position" in the relevant market, and enjoys a market share in excess of 60%.[10] Plaintiffs also assert that in several instances, Standard was granted lower prices on certain materials by Celotex than those granted to Olympia. The factual allegations are the basis for the alleged violations specified by plaintiffs in the Pretrial Statement, as follows: (1) monopolization and attempted monopolization of the relevant markets, (2) unreasonable restraint of trade within the relevant markets in violation of Section 1 of the Sherman Act, (3) price discrimination in violation of Section 2(a) and (f) of the Robinson-Patman Act, and (4) tying in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act.[11]

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[8] Although this is not specified, it is implicit in plaintiffs' contentions.

[9] Olympia's Second Amended Pretrial Statement, ¶¶ 18-26, 36.

[10] *Id.*

[11] Olympia's Second Amended Pretrial Statement, Legal Contentions, P. 32.

(On the latter allegation, Olympia contends that Celotex tied the furnishing of roofing bonds to the sale of materials.) The allegations of plaintiffs' Pretrial Statement contain the implications that Celotex and Standard conspired, but there is no specific allegation to that effect. A strict application of the Court's order relative to the Pretrial Statement would require that this legal contention be deemed abandoned or withdrawn. Nonetheless, the Court has addressed the issue of conspiracy herein.

Celotex contends that all of Olympia's allegations are either irrelevant, insufficient, unsupported, or contradicted by unrefuted evidence. Celotex further contends that certain of Olympia's claims are time-barred.

B. Fact of Damage and Amount of Injury

Plaintiffs seek treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, based upon alleged antitrust violations under several theories. In order to recover such damages, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to that violation, and (3) at least the approximate amount of damage. *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 579 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982). Mere proof of an antitrust violation, in and of itself, is not sufficient to support an award for damages; rather, a plaintiff must prove, as a matter of fact and with a fair degree of certainty, injury attributable to something the antitrust laws were designed to prevent. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562-563 (1981). "It is imperative that the fact of the damage causing injury be established." *In Re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 443 (5th Cir. 1982).

Olympia's conclusory allegations do not demon-

strate that it has suffered actual injury. The only element of damage that Olympia has attempted and quantify is that allegedly attributable to price discrimination.[12] However, that calculation merely presumes damages from the differential between prices extended to Olympia and Standard. As is developed further in our discussion of plaintiff's price discrimination claims, it does not purport to show actual injury by demonstrating the likelihood that Olympia lost sales or profits because Celotex extended discriminatory prices to standard, as required by law for Olympia to prevail on its claims.[13] Summarily, none of Olympia's allegations support the conclusion, or even attempt to demonstrate, that it suffered actual injury. The Court's review of the entire record in this matter leads to the inevitable conclusion that plaintiffs' claim of injury and for damages resulting therefrom amounts to nothing more than unsupported assumptions, conclusory allegations, and undocumented hypotheses, which are insufficient to withstand a summary judgment motion. In this case, as in the case of *In Re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 443 (5th Cir. 1982), plaintiffs have not established a triable issue of *fact* of injury, or of its cause, must less the amount of damage. There is a dearth of evidence which would establish this fact. Yet, at the trial of this matter, the plaintiffs would have been required to put forth substantial evidence on this issue. *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575,582 (5th Cir. 1982), **cert. denied**, 459 U.S. 908 (1982). Olympia relies on the statement that it "propose[s] to offer proof of damages. . . employing a ten year straightline projection of sales and loss net profits for a 'future' period of ten years

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[12] Olympia's Second Amended Pretrial Statement. ¶55.

[13] *See*, e.g., *Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562-563 (1981); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982).

from and after 1976."[14] However, this proposed methodology is of no moment, absent sufficient allegations of, and evidence to support, the fact of injury, which are nowhere to be found in the record of this case. Since Olympia has apparently chosen to rest upon its pleadings rather than substantiating its claims with evidence, summary judgment is appropriate. Rule 56(e) Fed. Rules Civ. Proc.; *See,* e.g., *In Re Municipal Bond Reporting Antitrust Litigation, supra; Jones v. Borden Co.*, 430 F.2d 568, 574 (5th Cir. 1970).

Having found that plaintiffs' claim for damages is fatally deficient in that plaintiffs have failed to produce evidence of injury and the amount of damages, the Court has in effect found that summary judgment on Olympia's claims is warranted herein. Nonetheless, for the sake of completeness, the Court further finds that summary judgment is warranted as to each of Olympia's allegations of violations of the antitrust laws, as set forth herein.

C. Monopolization

Olympia has failed to adduce evidence upon which a trier of fact could conclude that a *prima facie* case of monopolization has been established. the gravamen of Olympia's claim is its contention that from and after the year 1974, Celotex's unique bonding program eventually allowed it to achieve a market share in excess of 60%.[15] Olympia's allegations in connection with this claim are either unsupported by the facts or directly contradicted by the evidence, thus, requiring that summary judgment be granted.

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[14] Olympia's Second Amended Pretrial Statement, ¶55.

[15] Olympia's Second Amended Pretrial Statement, ¶36.

Olympia alleges that the relevant product market consists primarily of union bonded commercial roofing jobs over $250,000.00 in value.[16] Yet, it is uncontested that the largest job Olympia performed during the period from 1972 to date was in the range of $60,000.00 to $100,000.00. Olympia's president testified to this fact.[17] Thus, Olympia has defined the relevant product market, for purposes of this litigation, as one in which it was not even a participant for two years prior to and during the period of time when Celotex allegedly began to acquire monopoly power. Moreover, Olympia's definition of this market reflects an effect on a specific competitor, rather than the realities of competition, ignoring a major premise of antitrust litigation, that is, that the antitrust laws are concerned with "the protection of competition, not competitors." *See, Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).[18] Olympia's allegations of monopolization, in conformance with the evidence, cannot proceed past the threshold determination of the product market allegedly monopolized. As such, its contentions can only be con-

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[16] Olympia's Second Amended pretrial Statement, ¶¶56(g), 58(d)

[17] Deposition of William J. Manion, taken on May 31 and June 2, 1977, Vol. III, Tr. 114-115.

[18] The fallacy of plaintiff's reasoning is shown by Justice Stevens' comments in *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 298-299, (7th Cir. 1974):

> "The fact that an injury to a particular competitor may be unusually severe is not a justification for adopting a market definition which only considers the particular product line which he has previously sold or purchased. . .And whether the competition is more intense on the seller's or the buyer's side of the market, we may not arbitrarily segregate one brand from equally acceptable substitutes in order to protect a particular competitor from injury."

strued as going to an effect on a competitor,[19] rather than to competition in a defined product market.

Furthermore, the relevant geographic market alleged by Olympia has been artificially delineated without a full consideration of the facts and evidence. Olympia's own experts conceded that the existing information did not indicate whether the market chosen took into account either the areas in which Olympia actually competed[20] or the areas in which Olympia's actual competitors competed.[21] This reinforces the conclusion that the nature of the alleged wrong to Olympia must be couched in terms of an effect on a specific competitor, rather than on competition. And, as previously stated, it is the latter of these which the antitrust laws seek to protect.

Moreover, Olympia's allegation that Celotex acquired a market share in excess of 60% can only be termed sheer speculation, unsupported by any evidence which could possibly create a triable issue of fact in this regard. The lack of any evidence which would allow a trier of fact to determine Celotex's market share is predicated primarily upon the failure of Olympia to define the relevant product and geographic markets on the basis of any evidence of record. There is simply no data of record from which even a rough approximation of market shares could be derived, and the Court is left with no evidence of the origin

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[19] From the standpoint of adverse effects, the competitor in question is Olympia; from the standpoint of desirable effects, the competitor in question is Standard, based upon plaintiffs' allegations.

[20] Deposition of Dr. Jane S. Cromartie, taken on January 5, 1984, Tr. 140-148; Deposition of Phillip W. Jeffress, taken on January 4, 1984, Tr. 79-93, 140-141 & Exhibits 3, 4.

[21] Indeed, the geographic market utilized by plaintiffs' experts did not include Baton Rouge, Louisiana, although it was a controversy surrounding a Baton Rouge project which precipitated this litigation. See, Jeffress deposition, Tr. 54-63; Complaint (R. Vol. I, D. 1).

or accuracy of this figure. Olympia's experts admitted that the data accompanying its Second Amended Pretrail Statement showed only the percentage of Celotex sales that went to certain selected roofers in the New Orleans area, and agreed that this information had little (if any) meaning, in the context of this case, absent comparable figures for Celotex competitors. These same experts testified that the information was incomplete even as to Celotex sales and conceded that even complete information as to such sales would not enable them to adequately define Celotex's share of the relevant market.[22]

It is well-settled that the relevant product and geographic markets must be defined with some degree of precision to enable the trier of fact to determine the existence of monopoly power. *Dimmit Agri Industries, Inc. v. CPC International Inc.*, 679 F.2d 516 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). "[A] section 2 plaintiff attempting to prove either completed monopolization or attempt must provide the jury with sufficient evidence to permit it to define the relevant geographic and product market." *Id.* at 525. *See also, Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 441 (5th Cir. 1982); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276, 284-286 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979). Absent evidence to create a triable issue of fact in this regard, summary judgment is appropriate. Scranton Construction Co. v. Litton Industries Leasing Corp., 494 F.2d 778, 783 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

Furthemore, in this Circuit, "[i]t appears that something more than 50% of the market is a prerequisite

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[22] Cromartie Deposition, Tr. 33-35, 62-69, 77-80, 148-149, 207, 266-272, Exhibits 5 & 6; Jeffress Deposition, Tr. 79-83, 140-141, Exhibits 3 & 4.

to a finding of monopoly." *Cliff Food Stores, Inc. v. Kroger Co.*, 417 F.2d 203, 207 n. 2 (5th Cir. 1969). *Se also, Dimmit Agri Industries, Inc. v. CPC International, Inc.*, 679 F.2d 516, 528-531, nn. 11-13 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). The Fifth Circuit subscribes to the view that evidence of defendant's conduct in the market is inadequate to sustain a finding of monopoly, absent accurate information demonstrating a requisite market share. *Dimmit Agri Industries, Inc. v. CPC International, Inc.*, 679 F.2d 516, 528-531 and nn. 11-14 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082)1983); *see also, P. Agreeda & D. Turner, II Antitrust Law* ¶515 (1978).

In the instant case, the record discloses little more than unsupported and conclusory allegations of Celotex's conduct. And, viewing all inferences from the evidence of record in favor of the non-moving party, there is no evidence from which a trier of fact could conclude that Celotex enjoyed the requisite market share. Olympic argues that "industry observers" have concluded that Celotex acquired such a market share. Again, this is a conclusory allegation which is not borne out by the facts of this case, as shown by the record. Olympia's experts concede that there is insufficient data to come to a conclusion, with any degree of precision or accuracy, as to Celotex's share of the market. [23] Nor has Olympia demonstrated for purposes of defeating summary judgment, anywhere of record including in its Pretrial Statement, that there is evidence to support a finding, based on other than speculation, relative to Celotex's market share. Although in certain instances, an examination of the evidence on the issue

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[23] Jeffress deposition, Tr. 63-75; Cromartie deposition, Tr. 207. We note that one of these experts testified that he reached a conclusion of market power, based upon Celotex's bonding program which set it apart from other competitors. Jeffress deposition, Tr. 74-75. However, as is discussed, infra, Celotex's the bonding program does not constitute a willful acquisition of monopoly power, as required for a finding of monopolization.

of market share would reveal deficiencies which go to the weight and sufficiency of the evidence, in the instant case, there is simply no basis for a trier of fact to determine what is the relevant product and geographic markets and what is the defendant's market share. Under these circumstances, it would be futile for plaintiffs to proceed to trial on these claims.

Moreover, Olympia's allegation of the manner in which Celotex acquired monopoly power warrants the conclusion that defendants are entitled to judgment in their favor as a matter of law. Olympia alleges that Celotex "became possessed of an unique bond program", which allowed it to achieve a share of the market for sale of roofing materials to bonded union roofing contractors in excess of 60%. [24] Olympia asserts that this achievement resulted from charges in the bond programs of Celotex's competitors, and the circumstances attendant therein. [25] Thus, based solely upon Olympia's allegations in this regard, it is clear that if, in fact, Celotex achieved a market share of greater than 60% by reason of the bond program, then that achievement was the result of the unilateral actions of its competitors, Indeed, Olympia's experts stated unequivocally that Celotex's monopoly power, if any, was attributable to its bond becoming unique through the actions of its competitors with regard to their respective bond programs, as opposed to a willful acquisition of monopoly power by Celotex. [26] The United States Supreme Court has made it clear that a claim of monopoly will not lie absent willful acquisition of power:

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[24] Olympia's Second Amended Pretrial Statement, ¶36.

[25] *Id.*

[26] *Cromartie deposition, Tr. 38-39, 51-55, 174-178; Jeffress deposition, Tr. 74-75, 94, 113-117, 125-126, 132-134, 189-190. (R Vo.*

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966). Olympia's allegations, insofar as they might be construed to assert the acquisition of monopoly power through other means are addressed in the discussion below of the remaining claims.

D. Attempted Monopolization

In order to prove attempted monopolization under § 2 of the Sherman Act, 15 U.S.C. §2, Olympia must demonstrate that (1) Celotex had the specific intent to accomplish the illegal result, and (2) there was a "dangerous probability" that the attempt would be successful. *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir. 1978), cert. denied,* 440 U.S. 939 (1979).

Celotex argues that summary judgment should be granted on this claim based upon Olympia's failure to produce any evidence of specific intent. Following our review of all of the evidence of record, taking the factual allegations of Olympia's Pretrial Statement as true, and viewing all inferences from the evidence in favor of the non-moving party, we are enclined to agree. Olympia's claim of attempted monopolization, again, rests primarily on Celotex's acquisition of a unique bond program, which arose solely from the unilateral actions of Celotex's competitors. Based upon the facts, there is a dearth of evidence from which a trier of fact could conclude that Celotex had specific intent to acquire a monopoly. We are not unmindful that summary judgment is rarely appropriate on the issue of a par-

ty's intent. However, in the instant case, there is a more compelling basis upon which summary judgment must be granted as to this claim. The Fifth Circuit has held that proof of the relevant market in attempt cases is required in connection with the dangerous probability of success element of the attempt offense. *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 286 (5th Cir. 1978, *cert. denied*, 440 U.S. 939 (1979). Specifically, it is necessary for the plaintiff to establish a dangerous probility of monopolization *in the relevant markets. Id.* Thus, Olympia cannot prevail on this claim, based upon its failure to sufficiently define and establish the relevant markets, as discussed in sub-part C, above. In this case, evidence is "entirely lacking of the relevant market, its conditions, or of a monopoly or a dangerous probability of one"; thus, summary judgment is appropriate. *Scranton Construction Co. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 783 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

E. Price Discrimination

Celotex contends that Olympia's claims of price discrimination are time-barred. A four-year statute of limitations is provided in §4b of the Clayton Act, 15 U.S.C. §15b. It is uncontested that Olympia chose to discontinue dealing with Celotex in October of 1973.[27] The original complaint in this matter was filed on February 5, 1976.[28] Price discrimination was not specifically alleged by plaintiffs until the filing of an amended complaint on August 31, 1977.[29] Rule 15(c) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

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[27] Deposition of William J. Manion, taken on June 2, 1977. Tr. 126.

[28] R. Vol. 1 D. 1.

[29] R. Vol. III D. 63.

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Pleadings must be construed "as to do substantial justice." Rule 8(f) Fed. Rules Civ. Proc. In an antitrust action, pleadings must be given a liberal reading. *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). Although Olympia's original complaint did not specifically set forth an allegation of price discrimination, it is as that alleged in the original complaint. Thus, the claim is not time-barred.

Nonetheless, Olympia's claim of price discrimination cannot withstand summary judgment for several reasons. Olympia seeks damages for price discrimination allegedly (1) in violation of § 2 of the Robinson-Patman Act and (2) as part of a conspiracy in violation of § 1 of the Sherman Act. Even assuming that the underlying factual contentions upon which Olympia bases this claim are true, the claim is untenable.

(1) *Robinson-Patman Act*

Under § 2 of the Robinson-Patman Act, 15 U.S.C. §13, Olympia, in order to prevail, would be required to prove that Celotex discriminated in price (1) between different purchases (2) of commodities of like grade and quality (3) where the effect of such discrimination is to substantially lessen competition or tend to create a monopoly, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, and (4) where such differential is not in response to changing market conditions. *M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059,

1065 (5th Cir. 1975), *cert. denied,* 424 U.S. 968 (1976). Thus, a finding that the Act has been violated requires a showing that purchases are in competition with one another at the time of the purchases, and that there was a sale of like goods to at least two different purchases at different prices with an adverse effect upon competition. *Id.*

The uncontested evidence indicates that Olympia neither purchased materials from, nor placed orders with, Celotex after October of 1973.[30] Yet, Olympia claims damages for price discrimination from 1972 to 1976.[31] It is abundantly clear that Olympia cannot recover on any claim for damages allegedly resulting from price discrimination occurring after October of 1973, based upon the specific elements of the statute. Furthermore, Olympia has summarized forty-nine alleged instances of price discrimination in its Pretrial Statement, asserting that these "relate to contract work with respect to which Olympia and Standard were in direct competition."[32] This allegation is directly contradicted by the only relevant evidence on the issue. Specifically, of these forty-nine instances, only six represented situations in which Olympia and Standard made roughly contemporaneous purchases of similar goods from Celotex at different prices.[33] And, in those six instances, it is undisputed that Standard purchased materials from Celotex only after it had been awarded a roofing job. Based upon these facts, and upon the definition of a violation under the Robinson-Patman Act, no such violation is implicated. As previously stated, the Act protects purchases in competition with one another at the time

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[30] III Manion deposition (1977) Tr. 112-114, 127-129, II Manion deposition (1977), Tr. 23-24.

[31] Olympia's Second Amended Pretrial Statement, ¶ 55.

[32] Olympia's Second Amended Pretrial Statement, § 32.

[33] deposition of William J. Manion, taken on August 24, 1978. Tr. 186.

of the purchases; it is irrelevant that the companies may have entered into competitive bidding, or that the successful bidder was ultimately able to obtain prices below those offered to its competitiors in the bidding process. *M. C. Mannufacturing Co., Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1066-1068 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976).

Additionally, even if Olympia had succeeded in showing that these six instances of "discrimination" constituted contemporaneous purchases of similar goods at different prices, the claim still could not rise to the level of a violation of the Robinson-Patman Act. A simple mathematical calculation reveals that Olympia paid between $150 and $235 more than Standard did for the same materials. Olympia's expert agreed that price differential in the amount of $1,000.00 was"definitely" de minimus.[34] As previously stated, the Robinson-Patman Act is only violated where the effect of price discrimination may be to substantially lessen competition. It is inconceivable that the deminimus price differential at issue could be said to have such a substantial, if any, effect on competition. It is inconceivable that the de minimus price differential at issue could be said to have such a substantial, if any, effect on competition. *See*, e.g., *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220, 224 n.8 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974).

It should be noted at this juncture that Olympia has apparently sought to reserve the right to present additional instances of price discrimination.[35] Nonetheless, the time to have presented such further evidence would have been in opposition to the motions herein, particularly since

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[34] Cromartie deposition, Tr. 264.

[35] Olympia's Second Amended Pretrail Statement, ¶ 32.

Olympia has had over seven years in which to discover relevant evidence on the issue and to compile this information.

As defendant points out, at a trial of this matter, based upon the undisputed facts, Olympia would fail to make out a prima facie case on the issue of price discrimination. Moreover, and more importantly for purposes of summary judgment herein, Celotex has established by uncontroverted evidence that any discriminatory price was extended in good faith to meet a lower competitive offer. Section 2(b) of the Robinson-Patman Act 15 U.S.C. §13(b), has been interpreted to afford an absolute defense to a charge of violating § 2(a) of the Act, 15 U.S.C. § 13(a) where the defendant shows that lower prices were extended in good faith to meet an equally low price of a competitor. *FTC v. Sun Oil Co.*, 371 U.S. 505, 513-514 (1963). The Affidavits of Sam E. Brasher and W.W. LeGrow demonstrate that Celotex lowered its prices to individual roofers only when necessary to do so in order to meet a lower competitive offer, and only after a formal, detailed multi-tier system of verification.[36] The verification methods employed by delotex exceeded even those suggested by Olympia's expert.[37] And, these methods fall well within the appropriate ones discussed by the Supreme Court in *United States v. United States Gypsum Co.*, 438 U.S. 422, 454-455 (1978).[38] Indeed, this defense has been sustained based

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[36] Affidavit of Sam E. Brasher ¶¶ 7-20; Affidavit of W.W. LeGrow ¶¶ 20-30.

[37] Cromartie deposition, Tr. 245-252.

[38] On the issue of the good faith, meeting-competion defense, the Supreme Court stated:

> "Given the fact-specific nature of the inquiry, it is difficult to predict all the factors the FTC or a court would consider in appraising a seller's good faith in matching a competing offer in these circumstances. Certainly, evidence that a seller had received reports of similar discounts from other customers...or was threatened with a termination of pur-

upon less comprehensive schemes than that employed by Celotex for verification. *See,* e.g., *Great Atlantic & Pacific Tea Co. v. FTC,* 440 U.S. 69 (1979); *Jones v. Borden Co.,* 430 F.2d 568 (5th Cir. 1970); *Callaway Mills Co. v. FTC,* 362 F.2d 435 (5th Cir. 1966). The Supreme Court recently set forth the elements of this defense, as follows:

> "In summary, the meeting-competition defense requires the seller at least to show the existence of facts that would lead a reasonable and prudent person to believe that the seller's lower price would meet the equally low price of a competitor; it also requires the seller to demonstrate that its lower price was a good faith response to a competitor's lower price." *Falls City Industries, Inc. v. Vanco Beverage,* Inc., 460 U.S. 428, 103 S.Ct. 1282, 1297 (1983).

Celotex has established this defense based upon uncontroverted evidence. Olympia has asserted no substantiated facts to put the meeting-competition defense at issue, as it must do in order to defeat summary judgment on its price discrimination claim. Olympia's president conceded that he has no information concerning (1) what Celotex products Olympia bought or attempted to buy at which prices and at what times, (2) whether Celotex was actually meeting competitive offers when it extended price discounts to other roofers, and (3) whether Celotex attempted to verify competitive prices.[39] Nor has Olympia

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(Footnote 38 continued)

chases if the discount were not met...would be relevant in this regard. Efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data would also be probative as would the seller's past experience with the particular buyer in question." 438 U.S. at 454-455. [citations omitted.]

[39] Manion deposition (1978), Tr. 55-62, 69-72, 86-88, 91-93, 108-111, 115-116, 133, 136.

provided the Court with any evidence to create an issue of fact on its price discrimination claims. Under circumstances such as these, summary judgment is appropriate. *Jones v. Borden Co.*, 430 F.2d 568, 572 (5th Cir. 1970).

We note that this claim is also subject to summary judgment for the reason to which we previously alluded, i.e., failure to show any actual injury and damage. Olympia has calculated its alleged damage from price discrimination on the basis of an average differential of 5% between the cost it and Standard paid for Celotex materials. Olympia has then projected the effect upon its business, both in terms of profits and increased business, based upon the hypothetical premise of Olympia being granted an average 5% price reduction.[40] This approach is not a proper method for proving injury and damage under the Robinson-Patman Act. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562-563 (1981); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 577 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982). Assuming a violation of the Act has been shown, damages must be proven rather than presumed on the basis of the price differentials, since proof of actual injury is a prerequisite to recovery. *Id.* As previously stated, Olympia has come forth with nothing but its conclusory allegations of injury and damage, based upon improper assumptions. Furthemore, Olympia's calculation of alleged damages is premised upon the assumption that the allegedly unlawful price discrimination will be extended to Olympia, as well as to Standard. This assumption is unacceptable in actions such as the present one. *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1063-1065 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976).

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[40] Olympia's Second Amended Pretrial Statement, ¶55.

(2) *Sherman Act*

Under Section 1 of the Sherman Act, 15 U.S.C. §1, "[e]very contract, combination ...or conspiracy in restraint of trade or commerce...is ... illegal." The conspiracy issue will be specifically dealt with in a separate discussion. However, suffice it to say that this claim suffers from many of the same deficiencies addressed above. Primarily, the claim is deficient for plaintiffs' failure to produce evidence to create a triable issue of fact as to actual injury and damage. *See*, e.g., *M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), *cert. denied* 424 U.S. 968 (1976). Under the *Texas Foundries* rationale, Olympia would have to show not merely that Celotex conspired to drive Olympia out of business by extending discriminatory prices to its competitors, but also that (1) its competitors were warded jobs, (2) the competitors received unjustified discounts, and (3) Olympia was the next lowest bidder. There are not even the barest of factual allegations, or inferences therefrom, in Olympia's Pretrial Statement to support such a conclusion.

F. Tying

Olympia alleges that buyers were "coerced" into buying Celotex's building materials in order to obtain the more desirable bonds, and thus, Celotex tried roofing materials to roofing bonds in violation of § 3 of the Clayton Act, 15 U.S.C. §14.[41] The Fifth Circuit has identified four characteristics of an illegal tying arrangement, as follows: (1) two separate products, the tying product and the tied product, (2) sufficient economic power in the tying market to coerce purchase of the tied product, (3) involvement of a not insubstantial amount of interstate commerce in the tied market, and (4) anticompetitive effects in the tied market. *Driskill v. Dallas Cowboys Football Club, Inc.*,

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[40] Olympia's Second Amended Pretrial Statement, ¶53.

498 F.2d 321, 323 (5th Cir. 1974). More recently the Supreme Court has discussed the elements of a tying arrangement and particularly, the necessity that there be two separate products, in the case of *Jefferson Parish Hospital District No. 2 v. Hyde*, ____ U.S. ____, 104 S.Ct. 1551 (1984). The considerations on such a claim are whether two separate products were being sold that may be tied together, and, if so, whether the sellers used their market power to force their purchases to accept the tying arrangement. *Id.* at 1561. Whether two district products are involved "turns not on the functional relation between them, but rather on the character of the demand for the two items." *Id.* at 1562. A tying arrangement cannot exist unless two separate product markets have been linked. *Id.* at 1563, We find that the principals ennunciated in *Hyde* are dispositive of the instant case. Olympia has not alleged, nor can it conceivably claim, that Celotex's materials and its bonds are two separate and distinct products derived respectively from two separate and distinct product markets. There is simply no market for roofing bonds in and of themselves, absent bonded materials. Furthemore, and as previously discussed, Olympia has not even defined the relevant markets sufficiently to state such a cause of action. Summary judgment on the tying claim is appropriate.

G. Conspiracy

Olympia's factual allegations do not state a viable claim of conspiraty, and the record is completely devoid of any evidence to support this claim. Olympia apparently relies on its contention that Celotex "secretly" communicated to Standard that Olympia would not be accorded approved status at the same time Celotex published and circulated its current Approved Roofer list, from which Olympia had been excluded. [42] Celotex had produced

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[42] Olympia's Second Amended Pretrial Statement, ¶¶47, 49.

sworn affidavits denying the existence of any conspiracy between it and Standard. [43] Olympia has produced nothing in response thereto to create a triable issue of fact on the claim. The Fifth Circuit has consistently held that summary judgment is appropriate where a plaintiff rests on its mere allegations and fails to produce substantial evidence showing the existence of a genuine issue of fact, as required by Rule 56(e) of the Federal Rules of Civil Procedure. *See* e.g., *Parsons v. Ford Motor Co., cert. denied*, 459 U.S. 832. 669 F.2d 308, 313 (5th Cir. 1982); *Southern Concrete Co. v. United States Steel Corp.*, 535 F.2d 313, 318 (5th Cir. 1976); *Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 395-397 (5th Cir. 1976); *Scranton Construction Co. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 782 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Considering the several years of the pendency of this litigation, "[t]he mere hope that evidence may turn up to support a conspiracy does not suffice to warrant a trial." *Bougeois v. A.B. Dick Co.*, 386 F.Supp. 1094, 1097 (W.D. La. 1974).

III. Motion of Standard for Summary Judgment

For the reasons set forth relative to Olympa's motion for summary judgment, Standard's motion should, likewise, be granted. We shall not belabor and reiterate these reasons. However, we note certain additional points warranting summary judgment in favor of Standard.

A. Monopolization and Attempted Monopolization

Subparts II B, C and D are incorporated herein by reference. Additionally, the affidavit of Pierre F. Carriere further supports the conclusion that the relevant markets have not been accurately or sufficiently defined by Olym

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[43] Brassher Affidavit ¶¶ 7, 34; LeGrow Affidavit ¶¶ 16-19.

pia. Olympia's reliance upon gross sales solely to New Orleans roofers necessarily assumes that the market for roofing jobs in New Orleans is restricted to roofing contractors actually located in New Orleans, and further assumes that those contractors who are located in New Orleans do not perform jobs outside the New Orleans area. Both of these assumptions are unsupported by the facts and evidence, and are specifically refuted by the affidavit of Mr. Carriere. That affidavit indicates that although Standard is and always has been located in New Orleans, it has done extensive business throughout the State of Louisiana, and in the adjoining States of Mississippi and Texas, as well as in Georgia. Accordingly, the figures which Olympia has compiled as to Standard's purchases from Celotex and Johns-Manville include purchases by Standard not only for work which Standard performed in the New Orleans area, but also for work which Standard performed throughout Louisiana and in other states. As is further indicated and unrefuted by Carriere's affidavit, non-local roofing contractors constitute a significant segment of competitors in the New Orleans area. Yet, this fact has been ignored by Olympia in delineating the relevant geographic markets and in its allegations of market share.

B. Price Discrimination

Subpart II E is incorporated herein by reference. Furthermore, Standard has established, based upon unrefuted evidence, that it legitimately shopped for the best available price on roofing materials, and that it never received a price known or believed to be improper or discriminatory against a competitor. [44] In order to defeat summary judgment, Olympia would have had to come forward with evidence to create an issue of fact in this regard. This, Olympia has not done.

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[44] Affidavit of Pierre F. Carriere.

Accordingly, and for the foregoing reasons, it is ordered that the motions of defendants for summary judgment, dismissing plaintiffs' claims, be and they are hereby GRANTED. The clerk of court is directed to enter judgment in Accordance herewith.

New Orleans, Louisiana, this 9th day of Novermber, 1984.

/s/ Illegible

UNITED STATES DISTRICT JUDGE

APPENDIX B

OLYMPIA COMPANY, INC. AND
Olympia Roofing Company, Inc.,
Plaintiffs-Appellants,

v.

The CELOTEX CORPORATION, et al.,
Defendants-Appellees.

No. 84-3850
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Sept. 23, 1985.

Roofing contractor brought antitrust suit against materials supplier and against contractor's competitors alleging monopolization, price discrimination, and product tying, and seeking treble damages. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., 597 F.Supp. 285 entered summary judgment against roofing contractor, and appeal was taken. The Court of Appeals, Robert Madden Hill, Circuit Judge, held that: (1) roofing contractor, which did not produce any evidence tending to show "antitrust injury" beyond evidence of price difference, could not recover in suit under section 4 of Clayton Act, and (2) defendants were entitled to award of expenses, attorney fees, and double costs against roofing contractor and its appellate counsel for frivolous appeal.

Affirmed and remanded.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, TATE and HILL, Circuit Judges.

ROBERT M. HILL, Circuit Judge:

Appellants brought this antitrust action alleging claims of monopolization and attempted monopolization, unreasonable restraint of trade, price discrimination, and product tying. We affirm the district court's entry of summary judgment for the appellees, 597 F.Supp. 285, and because this appeal is so clearly frivolous, we assess expenses, attorneys' fees, and double costs against the appellants and their appellate attorney.

1. PROCEDURAL BACKGROUND AND FACTS

We note initially that for puposes of a motion for summary judgment all facts and inferences must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 8 L.Ed.2d 176 (1962). Summary judgment evidence is generally composed of the pleadings, depositions, answers to interrogatories, and admissions on file, together with any supporting affidavits. Fed.R.Civ.P. 56(c). Here, the district court ordered the parties to consolidate all factual contentions, claims for relief, defenses, and other affirmative matters in respective pretrial statements. The court specified in its order that any such matters not set forth in the pretrial statements would be deemed abandoned or withdrawn. We therefore evaluate the facts and contentions of the parties as reflected in the pretrial statements.

Appellants, Olympia Company, Inc., and Olympia Roofing Company, Inc., (hereinafter jointly referred to as Olympia) engaged in the business of securing roofing jobs and furnishing roofing services within the New Orleans area. In doing so, Olympia purchased roofing materials from appellee the Celotex Corporation (Celotex) and its business predecessors. Among Olympia's competitors were appellees Standard-Taylor Industries, Inc., (whose chief executive officer was appellee Robbins Taylor) and Standard Roofing Company of New Orleans, Inc., (whose chief executive officer was appellee Pierre F. Carriere) (hereinafter all such entities and individuals are jointly referred to as Standard).

For several years, Olympia was on Celotex's approved roofers list. This enabled Olympia to secure a Celotex roofing bond for any roof that was installed and repaired by an approved roofer using Celotex's materials in accordance with Celotex's specifications. According to Olympia, such roofing bonds were required by architectural specifications for virtually all large commercial roofing jobs, and by 1974 Celotex's roofing bonds were superior to those offered by competing suppliers of roofing materials in the New Orleans area.

Due to a dispute over credit terms, Celotex deleted Olympia from the list of approved roofers entitled to Celotex roofing bonds. According to Olympia, Celotex thereafter refused to deal with Olympia on the same terms offered Standard. Celotex continued to sell roofing supplies to Standard and to offer to Standard the Celotex roofing bonds. Olympia alleged that Standard was granted lower prices on certain materials by Celotex than those granted to Olympia, with an overall price differential of five percent. Olympia further alleged that Celotex obtained a dominant position in the relevant market, enjoying a more than

sixty percent market share.

Olympia filed this action in 1976. As consolidated in its pretrial statement, Olympia allegations were that Celotex and Standard committed the following violations of the antitrust laws: (1) monopolization and attempted monopolization of the relevant markets, (2) unreasonable restraint of trade within the relevant markets, (3) unlawful price discrimination, and (4) unlawful tying of the furnishing of roofing bonds to the sale of roofing materials. Olympia's pretrial statement implied that Celotex and Standard conspired, but there was no specific allegation to that effect. Olympia sought treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15.

The ensuing litigation had an extended history in the district court, as evidenced by eleven volumes of record and six boxes of exhibits. During the four years following 1976, the case produced extensive discovery, several amendments to the complaint, a number of changes in Olympia's counsel and numerous extensions and continuances. On January 7, 1980, Celotex's and Standard's motions for summary judgment were ordered continued to allow Olympia another change of counsel for the purpose of clarifying the issues. It was on June 17, 1980, that the district court ordered the parties to file pretrial statements relating all facts and legal contentions. The Court accepted Olympia's pretrial statement, although it was filed over four months late and subsequently amended twice.

The district court entered summary jmudgment for Celotex and Standard on all of Olympia's claims. The accompanying exhaustive opinion found that Olympia failed to produce evidence of antitrust injury or damages, and that Olympia failed to produce evidence to establish two or more necessary elements of each of the substantive claims.

Olympia appealed and again changed attorneys. Additionally, Olympia has filed a "Motion to Include Material Into the Appeal Record not Presented to District Court." Finally, Celotex and Standard request that this court impose sanctions against Olympia and its appellate counsel for filing a frivolous appeal.

II. REQUIREMENT OF INJURY AND DAMAGES

[1-3] Section 4 of the Clayton Act limits treble damages to a private litigant "who shall be injured in his business or property by anything forbidden in the antitrust laws." 15 U.S.C. § 15. Such a plaintiff must prove not only an antitrust violation, but also "cognizable injury attributable to the violation, and . . . at least the approximate amount of the damage." *Chrysler Credit Corp. v. J. Truett Payne Co. Inc.*, 670 F.2d 575, 579 (5th Cir.), *cert. denied.* 459 U.S. 908, 103 S.Ct. 212, 74 L.Ed.2d 169 (1982). In particular, the plaintiff must prove "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (emphasis in original). Injury is required in section 4 actions regardless of the nature of the underlying antitrust violation. *See Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 304-05 (5th Cir.) *cert. denied*, — U.S. —, 105 S.Ct. 123, 83 L.Ed.2d 65 (1984) (monopolization, attempted monopolization, conspiracy in restraint of trade); *Chrysler Credit Corp.*, 670 F.2d at 579 (price discrimination); *Cash v. Arctic Circle, Inc.*,85 F.R.D. 618, 622 (E.D.Wash.1979) (tying). While summary judgment is to be used cautiously in complex antitrust litigatiion, it is nevertheless available where no antitrust injury or damages have been presented. *See Bayou Bottling,* 725 F.2d

at 303-05.

Olympia's theory of antitrust injury can be easily summarized. In its pretrial statement, the only element of injury or damages that Olympia attempted to identify and quantify was that attributable to the alleged price discrimination. Olympia stated that had it received the same five percent price reduction that Standard allegedly received, it would have made an increased profit of $38,157.65 from 1972 to 1976, and its sales would have increased by forty percent. However, in its pretrial statement Olympia failed to point to any evidence that would bear out this calculation. Instead, Olympia "propose[d] to offer proof of damages using this basic methodology and employing a ten year 'straightline' projection of sales and loss [sic] net profits for a 'future' period of ten years from and after 1976." Olympia on appeal has not presented any different theory of injury or damages, nor does it cite to any evidence that it contends creates a dispute of fact.

[4] We agree with the district court's finding that Olympia's "claim of injury and for damages amounts to nothing more than unsupported assumptions, conclusory allegations, and undocumented hypotheses." Olympia has not produced any evidence tending to show antitrust injury beyond evidence of price difference. It states in its briefs, without any accompanying explanation, that affidavits that it filed in 1979 were sufficient to avoid summary judgment, but these materials contain no information relevant to injury or damages.[1] Olympia's proposed methodology is insufficient to survive a summary judg-

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[1] Olympia summarized its argument by claiming that "countervailing affidavits" filed in 1979 were sufficient to avoid summary judgment. These allegations were abandoned to the extent Olympia failed to include them in the pretrial statement, and in any event the materials Olympia referred to contain no information relevant to the issues of injury and damages.

ment motion absent allegations of, and evidence to support, the fact of injury, which are not to be found in this voluminous record. Because Olympia apparently chose to rest upon its pleadings on this issue rather than substantiate its claims with evidence, summary judgment is permissible. *See* Fed. R. Civ.P. 56(e). Since Olympia created no genuine issue of the material matters of injury and damages, and since Celotex and Standard were entitled to judgment as a matter of law, the district court's entry of summary judgment was appropriate. *See* Fed.R. Civ.P. 56(c).

[5] Moreover, evidence of price discrimination is not, by itself, adequate evidence of damages. "[P]roof of a [price discrimination] violation does not mean that a disfavored purchaser had been actually 'injured' within the meaning of § 4" of the Clayton Act. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 101 S.Ct. 1923, 1927, 68 L.Ed.2d 442 (1981). "Price difference without more does not indicate the amount of lost sales or profits." *Chrysler Credit Corp.*, 670 F.2d at 582. Olympia cannot rely on "mere speculation and guesswork" to substantiate its damages. *See id.* Olympia's bare projection of future profits is insufficient to meet its evidentiary burden. Any coincidental financial problems Olympia may have suffered at the time the alleged price discrimination occurred is not by itself enough to demonstrate antitrust injury. *See id.* at 581-82.

[6] Even if Olympia had been able to factually substantiate its claims, its theory of damages would be unacceptable. Olympia may not base its damage claim on calculations showing what would have occurred had it received an allegedly discriminatory price. *See M.C. Manufacturing Co., Inc. v. Texas Foundries*, 517 F.2d 1059, 1063-65 (5th Cir. 1975), *cert. denied*, 424 U.S. 968, 96 S.Ct. 1466, 47 L.Ed.2d 736 (1976). Instead, Olympia must show

what would have happened had there been no discriminatory prices granted to Standard. *Id.* at 1064. Olympia cannot show damages merely by stating that it would have benefited by sharing in the lower, discriminatory prices with Standard. This is because

> [r]estoration of the competitive freedom which the Sherman Act is designed to protect through elimination of the anti-competitive practice is accomplished here by disregarding the special conspiratorial price . . ., not by hypothetical broadening of the conspiracy to give [the defendant/buyer's] abnormally low price to [the plaintiff] as well.

Id. at 1065.[2]

III. FRIVOLOUS APPEAL

[7] Standard and Celotex request the award of damages and double costs as sanctions against Olympia and its attorney for the filing of a frivolous appeal. Such an award may be made against an appellant under 28 U.S.C. § 1912 and Fed.R. App.P. 38, and against an attorney under 28 U.S.C. § 1927.[3] *See Hagerty v. Succession of*

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[2] Olympia also makes the frivolous argument that a recently passed Louisiana statute, La.Rev.Stat.Ann. § 39:1963(C) (West Supp. 1985), shows a five percent price differential to be a "devastating advantage." This statute requires certain public contracts be awarded to minority business that bid within five percent of the lowest bidder. How this statute can show that Olympia suffered any damage escapes us.

[3] 28 U.S.C. § 1927 entitled Counsel Liability for Excessive Costs provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the

Clement, 749 F.2d 217, 221-22 (5th Cir.1984). A frivolous appeal is one which "involves legal points not arguable on their merits." *Id.* at 222 (citing *Howard v. King*, 707 F.2d 215, 220 (5th Cir.1983)). Sanctions against Olympia's appellate counsel are available if he has acted "unreasonable and vexatiously" to multiply the proceedings in this case. *See* 28 U.S.C. § 1927.

[8] We have no difficulty in concluding that Olympia and its appellate counsel should be jointly assessed the sanctions of expenses, attorneys' fees, and double costs in connection with this appeal. Olympia has failed to produce any evidence of antitrust injury and its theory of damages has been expressly rejected by this Court in prior case law. Olympia's appellate counsel had made virtually no effort to point to evidence raising a genuine issue of material fact. His rambling briefs include citations to affidavits in the record which have little to do with the issues in this case, and which are unaccompanied by any explanation of what relevant evidence the cited affidavits supposedly contain.

Additionally, Olympia's appellate counsel made no attempt to address most of the issues raised in the district court's opinion. While we realize that the lack of damages or injury was enough to dispose of Olympia's action, we

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(Footnote 3 continued)

> proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1912 entitled Damages and Costs on Affirmance provides:

> Where a Judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Rule 38 of the Federal Rules of Appellate Procedure entitled Damages for Delay provides:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

note that Olympia did not address enough of the requisite elements to obtain reversal on any of its substantive claims.[4] Instead, Olympia's appellate counsel's main concern appears to be the possibility of succeeding in a future malpractice action against one of Olympia's prior attorneys. Olympia also calls on this court to, among other things, stay bankruptcy proceeding against a non-party in order to allow deposition of one of its employees, although it fails to explain how or why we should take such action. Many, if not most, of Olympia's arguments are similarly puzzling and exasperating. We are hard pressed to imagine a more meritless, vexatious, or unreasonable appeal.

We therefore grant the appellees' requests for expenses, attorneys' fees, and double costs against Olympia and its appellate counsel. However, rather than our determining the amount of expenses and attorney's fees incur-

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[4] Aside from the issue of damages, the district court dismissed Olympia's claims on the following grounds:

> *Monopolization:* no adequate evidence of the relevant market, no evidence that Celotex possessed monopoly power, and no evidence that the alleged monopoly resulted from actions of Celotex, rather than those of its competitors; *Attempted monopolization:* no evidence of intent and no evidence of relevant market;
> *Price discrimination:* no evidence of discriminatory prices, no evidence that alleged discrimination had a substantial effect on competition, no evidence that alleged price differences were not simply good faith attempts to meet competitors' prices, and no evidence that Standard was aware of any discrimination; *Tying:* the allegedly tied products were not separate products; and
> *Conspiracy to restrain trade:* no evidence of conspiracy.

Olympia's arguments on appeal are very difficult to decipher, but the only issues other than damages that it expressly addresses are relevant market, the existence of price differences, and conspiracy. As to the latter, Olympia makes no attempt to point to evidence that a conspiracy existed. We do not reach the substantive claims and express no opinion thereon, but we note these issues to illustrate the frivolousness of the appeal.

red by appellees in this appeal, we remand to the district court for such determination. *See Hagerty*, 749 F.2d at 223; *Lewis v. Brown & Root, Inc.* 722 F.2d 209, 210 (5th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 975, 79 L.Ed.2d 213 (1984).

IV. SUMMARY

We affirm the district court's entry of summary judgment for the appellees. Due to the frivolous nature of this appeal, we grant appellees' requests to assess expenses, attorneys' fees, and double costs jointly against the appellants and their appellate counsel. We remand this case to the district court for a determination of the amount of expenses incurred on appeal and appellees' appellate attorneys' fees.

Judgment **AFFIRMED: REMANDED** for assessment of expenses and attorneys' fees.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Feb 19-'86

OLYMPIA COMPANY, INC. ET AL CIVIL ACTION

VERSUS NO. 76-373

THE CELOTEX CORPORATION ET AL SECTION "A"

J U D G M E N T

Considering the Court's Order and Reasons dated February 13, 1986, accordingly:

IT IS ORDERED, ADJUDGED, AND DECREED, that the Court awards recovery for 109.5 hours of attorney work at $100.00 per hour, or $10,950.00; 7.5 hours of paralegal work at $20.00 per hour for a total of $150.00 and costs in the amount of $437.86, for a total of $11,537.86 with interest to run from date of judgment.

New Orleans, Louisiana, this 18th day of February, 1986.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY FEB 19 1986

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FEB. 4 '86

OLYMPIA COMPANY INC., ET AL CIVIL ACTION

VERSUS NO. 76-0373

THE CELOTEX CORPORATION, ET ALSECTION "A"

ORDER & REASONS

SCHWARTZ, J.

This matter is before the Court upon remand from the Fifth Circuit Court of Appeals for a determination of the amount of expenses, attorneys' fees and costs to be awarded to defendants in light of the Appellate Court Opinion of September 23, 1985. A hearing was held on January 22, 1986, at which time the Court heard argument upon the submissions of defendant Celotex Corporation under Local Rule 21.16. For the reasons explained more fully below, the Court finds that defendant Celotex is entitled to a total award of $11,537.86 representing its expenses and attorneys' fees incurred in connection with the appeal in this matter.

In making its determination as to the quantum of recovery herein, the Court is bound by the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Accordingly, the Court will address each of the *Johnson* factors for awards of attorney's fees in the order set forth in that decision:

(1) The Court first considered Celotex's claims for recovery of a total of 117.75 hours work in connection with

DATE OF ENTRY Feb 16 1986

the appeal. The Court has carefully reviewed the time records submitted by the defendant and concludes that defendant is entitled to recover fees pertaining to 117 hours of the amount claimed. In making this determination, the Court has discounted .75 hours claimed for review of the work performed by the trial attorney for Celotex, Mr. Frazier, by another member of his firm. The Court finds such review to have been an unnecessary duplication of effort. At the same time, the Court finds reasonable Mr. Frazier's fee of $100.00 per hour, particularly in light of Mr. Frazier's ten years experience in practice and in light of amounts charged by other attorneys in the city.

Included within the 117 hours, is the allowance of 7.5 hours work done by a paralegal employed by Mr. Frazier's firm. A review of the time records submitted by Celotex shows the paralegal work encompassed primarily organizational and court run duties, in contrast to Mr. Frazier's time spent drafting the brief to be submitted to the Fifth Circuit and preparing and attending argument in connection with the appeal. Thus, the paralegal work will be recoverable in the amount of $20.00 per hour, instead of the $35.00 per hour amount claimed by defendant Celotex.

(2) The instant matter was an anti-trust claim alleging monopolization, price discrimination and product tying. While such issues are not new to the courts, they are difficult, and proper evaluation and presentation of the factual setting and legal theories inherent in such claims require time and expertise. Accordingly, the Court finds the amount of time devoted to the appeal proportionate to the difficulty of the issues inherent in the litigation.

(3) As indicated above, litigation of this type does require certain skill to perform the legal service properly, as does the presentation of briefs and argument to the Fifth

Circuit Court of Appeal. This Court has also observed Mr. Frazier's demeanor at the hearings and finds his fee to be reasonable in light of his expertise.

(4) There has been no showing or argument that other employment was precluded due to the acceptance of this case. Accordingly, no particular premium for or consideration of this factor is warranted.

(5) The Court finds Mr. Franzier's fee reasonable and within the range of customary fees charged in a New Orleans community. However, the Court finds the $35.00 per hour fee claimed for paralegal services excessive in this case, where there was no showing of any special expertise by the paralegal nor any showing as to her salary and cost to the firm. Accordingly, the Court has taken judicial cognizance that paralegals in the New Orleans community may earn anywhere between $14,000 and $26,000 annually, with an approximate hourly salery of $10.00-$18.00 per hour. Thus, the Court concludes that the actual cost of paralegal employment to a firm in this community approximates $20.00 per hour, giving some leeway for benefits afforded the paralegal as part of his or her employment. The Court does not deem it appropriate to award a law firm the same profit margin for the services of a paralegal as a firm would be entitled for the services of a lawyer. Accordingly, the amount awarded for paralegal services is reduced from the claim of $35.00 per hour to $20.00 per hour.

(6) Consideration whether the fee is fixed or contingent in this case is rendered academic by the charge to the client of a fee on an hourly basis which this Court finds reasonable. In addition, the fee in this case must be evaluated from a defense standpoint, in light of customary hourly billing for defense work.

(7) The Court does not find any particular premium necessitated by any time limitations imposed by the client or the circumstances and accordingly, limits recovery to a reasonable fee for the actual hours of work recorded.

(8) Plaintiff demanded one million dollars for actual and treble damages under state and federal anti-trust laws. Celotex obtained a dismissal of plaintiff's claims. These considerations generally support the Court's determination that the hours invested by Mr. Frazier were reasonable and the charge for those hours was likewise reasonable.

(9) The Court finds Mr. Frazier's hourly fee of $100.00 per hour appropriate in light of his experience, as discussed above.

(10) The undersirability of this case does not require any special permium or consideration by this Court.

(11) Likewise, the Court does not find that the nature and length of the professional relationship with the client warrants any special consideration in this case.

(12) There has been no showing or discussion of awards made in similar cases for appellate work alone. However, on the basis of the Court's experience, the Court finds that the amount of time devoted by Mr. Frazier is reasonable.

The statements submitted by Celotex also set forth an expenditure of $613.36 in expenses. Of that amount, $175.50 in costs has already been assessed against plaintiff and in favor of Celotex by the Appellate Court. Accordingly, the Court awards to defendant additional costs in the amount of $437.86. Plaintiff does not challenge the reasonableness of these costs or their necessity as part of defendant's preparation for the appeal.

For the foregoing reasons, the Court awards recovery for 109.5 hours of attorney work at $100.00 per hour, or $10,950.00; 7.5 hours of paralegal work at $20.00 per hour for a total of $150.00 and costs in the amount of $437.86, for a total of $11,537.86 with interest to run from date of judgment. The Clerk of Court is hereby ordered to enter judgment accordingly.

New Orleans, Louisiana, this *13th* day of February, 1986.

/s/ illegible
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Oct 12 -'88

OLYMPIA COMPANY, INC. CIVIL ACTION
OLYMPIA COMPANY, INC., ET AL

VERSUS NO. 76-373

THE CELOTEX CORPORATION ET AL SECTION "A"

MOTION AND ORDER FOR RELEASE OF EXHIBITS

NOW INTO COURT, through undersigned counsel, comes Olympia Roofing Company, Inc., et al, and respectfully moves this Court to issue an Order to release for inspection and duplication to the petitioner herein upon a signed custody receipt the exhibits submitted to resist Summary Judgment in the above named and numbered cause, said exhibits having been in storage and now in the custody of the Clerk, United States District Court, Eastern District of Louisiana.

A Memorandum accompanies this Motion.

Respectfully submitted,

/s/W. J. Manion

W. J. MANION
Attorney for Plaintiffs
P. O. Box 1776
Slidell, LA 70459
(504) 649-4000

ORDER

Presented for consideration and determination in regards to plaintiffs' Motion herein;

IT IS ORDERED that the Clerk of Court, United States District Court, Eastern District of Louisiana, release for inspection and duplication the exhibits filed with this section upon custody receipt, and said exhibits are to be returned to the Clerk of Court within 21 days from the date of this Order.

New Orleans, LA, this 12th day of October, 1988.

/s/ illegible

DISTRICT JUDGE

CERTIFICATE

I certify that a copy of this Motion and Order will be mailed to Jack N. Price, 410 Congress Avenue, Austin, TX 78701.

/s/ W. J. Manion

W. J. MANION

RECEIVED 5 BOXES OF EXHIBITS AS PER ATTACHED LISTS THIS *14* DAY OF OCTOBER, 1988.

BY: /s/ W. J. Manion

W. J. Manion, Esq.

DATE OF ENTRY OCT 17 1988

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed MAR 1 -1989

No. 84-3850

USDC #CA 76-373 A

OLYMPIA COMPANY, INC. and
OLYMPIA ROOFING COMPANY, INC.,
Plaintiffs-Appellants;

versus

THE CELOTEX CORPORATION, ET AL.,
Defendants-Appellees.

- - - - -

Appeals from the United States District Court for the
Eastern District of Louisiana

- - - - -

O R D E R:

IT IS ORDERED that the motion of appellants to recall the judgment of this Court has to remand the cause to the district court for a new trial is DENIED.

/s/ THOMAS M. REAVLEY
UNITED STATES CIRCUIT JUDGE

APPENDIX F

OLYMPIA ROOFING CO., INC. CA-8909
OLYMPIA COMPANY, INC. TRAILER
TRUCK BODIES, PARTS COURT OF APPEAL
AND SERVICE, INC., ET AL
FOURTH CIRCUIT

VERSUS

C. ELLIS HENICAN, SR. AND STATE
LAW OFFICE OF HENICAN, OF
JAMES & CLEVELAND LOUISIANA

AN APPEAL FROM THE CIVIL DISTRICT COURT, PARISH OF ORLEANS NO. 77-3453, DIVISION "H", HONORABLE REVIUS O. ORTIQUE, JR., JUDGE

* * * * * * * * * * * * *

WILLIAM H. BYRNES, III
JUDGE

* * * * * * * * * * * * *

(Court composed of Judges William H. Byrnes, III, David R. M. Williams, and Steven R. Plotkin)

OCT 11 1989

SESSIONS, FISHMAN, ROSENSON,
BOISFONTAINE, NATHAN & WINN
JACK M. ALLTMONT
New Orleans, Louisiana
Attorneys for Defendants-Appellees

W. J. MANION
P. O Box 1776
Slidell, Louisiana
Attorney for Plaintiffs-Appellants

AFFIRMED

Appellants, Olympia Company, Inc. Olympia Roofing Company and Trailer Truck Body Parts and Service Inc., brought this negligence action alleging that the testimony of appellee, C. Ellis Henican, during a lawsuit previously brought by Olympia Roofing Company, Inc. against the City of New Orleans, caused the dismissal of that lawsuit. We affirm the district court's granting of appellees' Motion for Summary Judgment. Further, because we find this appeal to be frivolous we assess $2,500.00 as damages, plus court costs, against appellants and their appellate attorney.

FACTS

This appeal arises out of two lawsuits filed by appellants. The first, filed in 1977, contained allegations by appellants against Mr. Henican Concerning the allegedly false testimony he gave in an earlier suit brought by Olympia Roofing Company Inc. against the City of New Orleans and the UPT. It was alleged that, at the trial of this earlier matter Mr. Henican testified that the proper name for the plaintiff in that action was Olympia Company, Inc. not Olympia Roofing Company, Inc. Subsequently, that suit was dismissed for failure to name the proper party plaintiff. Appellants herein contend that the dismissal in the earlier suit against the City was due to Mr. Henican's allegedly false testimony regarding the correct name of Olympia. Rather than cure the relatively minor defect in the prior suit by amending the petition or appealing the judgment of dismissal, appellants instead filed suit in 1977 against Mr. Henican. With the exception of four amending petitions the 1977 suit remained inactive for seven years until Mr. Henican filed a Motion for Summary Judgment in 1984. The Judge referred the Motion to the merits and set the case for trial before a Commissioner on March 15, 1985. Prior to this trial date appellants filed a second suit

attempting to revive its previously dismissed claims against the City and the UPT. The 1985 suit also realleged the claims against Mr. Henican as an alternative to recovery from the City and the UPT.

Both suits were apparently consolidated and in March, 1987 Mr. Henican re-urged his previously filed Motion for Summary Judgment. The Motion was heard in April, 1987 before a Commissioner. The Commissioner recommended granting the Motion which recommendation was adopted by the District Court on May 1, 1987. The Judgment was amended, due to an apparent clerical error, to reflect that the dismissal of appellants' claims against Mr. Henican was effective as to both the 1977 and 1985 suits, as consolidated. Appellants' Motion for a New Trial was denied and this appeal followed.

LAW

Louisiana Code of Civil Procedure Article 966(b) provides in pertinent part, as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." (emphasis added)

It is well settled that summary judgment should only be granted when reasonable minds must inevitably concur that there exist no genuine issues of material fact. *Whitney v. Maltet,* 442 So.2d 1361 (La. App. 3rd Cir. 1983), *writ den* 445 So.2d 437. All reasonable doubts as to the propriety of the summary judgment are to be resolved against granting the motion and in favor of trial on the merits.

American Bank & Trust Co. v. Sunbelt Environmental Systems, Inc., 451 So.2d 1111 (La. App. 1st. Cir. 1984); *Other v. Sharp ELectric, Inc.*, 451 So.2d 1235 (La. App. 4th Cir. 1984). In considering the motion the trial court should look to the pleadings, depositions and other documents of record to determine the existence of a genuine issue of material fact. *Otter v. Sharp Electric, Inc., supra; Kerwin v. Nu-Way Construction Service, Inc.*, 451 So.2d 1195 (La. App. 5th Cir. 1984). Additionally, it has been held that one purpose of the summary judgment is to dispose of frivolous claims. *Schaefer v. Lynch*, 406 So.2d 185 (La. 1981). Although summary judgments are not generally favored we have reviewed few, if any, cases more deserving of summary disposition than the case at bar.

After sifting through appellants' "brief" and separating out the primarily superfluous and purely vindictive statements it is abundantly clear that the only material fact in this lawsuit concerns set out many other supposedly material facts, it is solely the allegedly false testimony of the attorney that forms the entire basis for the case before this court.

William J. Manion, who is not only appellants' attorney, but, also the President of Olympia Company, Inc. testified unequivocally that as President of Olympia Company he had no quarrel with the way in which Mr. Henican or his law firm handled Olympia's corporate affairs. Manion testified further that the sole basis of the instant law suit was Mr. Henican's testimony at trial in 1976. (Manion deposition at pp. 30-31, 33, 34 and 45-46).

Thus, the sole material fact concerns the content of that testimony. The only question before us, then, for purposes of determining the propriety of granting the summary judgment is whether this genuine issue was in

dispute. We find that it was not.

We do not have the transcript from the 1976 trial before us. This is apparently due to Mr. Henican's failure to timely request same following the trial. The record before us, however, contains sufficient evidence of Mr. Henican's testimony at that trail. As noted above, Mr. Manion testified that the proper party plaintiff to the earlier lawsuit was Olympia Company Inc. and not Olympia Roofing Company, Inc. Moreover, Mr. Henican does not dispute that this was the content of his 1976 testimony. Clearly, then, the actual content of Mr. Henican's testimony is not in dispute and therefore is not an *issue* of material fact. Similarly, the record supports the finding that the veracity of Mr. Henican's testimony is likewise not in dispute.

The record contains copies of the annual reports of "Olympia Company Inc." encompassing the years 1972-1982. These reports were filed with the Secretary of State and signed by Mr. Manion. Moreover, Mr. Manion testified regarding the name change in 1969 from Olympia Roofing to "Olympia Company, Inc." and the fact that the name was still "Olympia Company, Inc." at the time of Mr. Henican's testimony. Mr. Manion specifically testified at pp. 31-32 of his deposition, as follows:

> "Q. Let me ask you this. You filed with the court an affidavit. It was filed May 25, 1978, and the affidavit is four pages signed by you and dated May 24, 1978. Is this, in fact, your signature?
>
> A. That's my signature.
>
> Q. And in that affidavit you appear to state that subsequent to the name change of the company March 27, 1969, that's when it was changed to Olympia Company, Inc.?
>
> A. Yes.

Q. There were discussions about changing the name back to Olympia Roofing Company, Inc.

A. No question about that.

Q. But to your knowledge that was never done?

A. Never done.

Q. And you knew that was never done?

A. I had never been informed. I never signed any papers to that effect.

Q. Had the name of the company ever been changed before without you signing it?

A. No. I have said that I have no quarrel with that."

Thus, it is clear that Mr. Henican testified truthfully and accurately about the status of Olympia at the 1976 trial. Accordingly, we find there is no genuine issue of material fact and therefore, summary judgment was proper.

DAMAGES FOR FRIVOLOUS APPEAL

Appellees request that we award damages and costs as sanctions against appellants for filing a frivolous appeal. Louisiana Code of Civil Procedure Article 2164 provides:

> "The appellate court shall render any judgment which is just, legal and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof,

> against any party to the suit, as in its judgment may be considered equitable."

In *Parker v. Interstate Life & Accident Insurance Company,* 248 La. 449, 179 So.2d 634, 637 (1965) the court held:

> "[W]hen counsel proclaims his sincerity, a court finds itself without just cause to disbelieve unless, and only unless, the proposition advocated is so rediculous or so oppossed to rational thinking that it is evident beyond any doubt that it is being deliberately professed for ulterior purposes."

See also, *Rogers v. D'Hubin,* 498 So.2d (La. App. 1st. Cir. 1986.) The instant appeal presents just such a case.

Mr. Manion and Olympia are no strangers to the frivolous appeal. In *Olympia Co. Inc. v. Cleotex Corp.,* 771 F. 2d 888, 893 (5th Cir. 1985) the court found that *Cleotex* was entitled to damages for frivolous appeal and stated:

> "Olympia's appellate counsel has made virtually no effort to point to evidence raising a genuine issue of material fact. His [Manion's] rambling briefs include citations to affidavits in the issue in this case, and which are unaccompanied by any explanation of what relevant evidence the cited affidavits supposedly contain.
>
> "Olympia's appellate counsel's main concern appears to be the possibility of succeeding in a future malpractice action against one of Olympia's prior attorneys.
>
> * * * *
>
> Many, if not most, of Olympia's arguments

> are...puzzling and exasperating. *We are hard pressed to imagine a more meritless, vexatious or unreasonable appeal.*" (emphasis added)

What was difficult to imagine for our Bretheren on the Federal Bench has now come to pass.

As in *Celotex* the record before us contains rambling briefs and unsupported allegations. Once again, Mr. Manion's chief concern appears to be laying the groundwork for some future malpractice action against one of Olympia's prior attorneys, Mr. Henican.

There is no dispute over the content of Mr. Henican's prior testimony. There is no evidence to support a dispute over the veracity of that testimony. Yet, despite the overwelming evidence, including Mr. Manion's own testimony, appellate put forth paragraph after paragraph of meaningless and irrelevant allegations in a clear attempt to cloud the issues. Therefore because there is no evidence and law in dispute, this appeal is frivolous; entitling the appellees to damages for a new appeal.

Accordingly, we affirm the judgment of the trial court and award $2,500.00 as damages plus costs of this appeal.

AFFIRMED

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, **DEC 14 1988**, 198_____

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

OLYMPIA ROOFING CO., INC., ET AL VS C. ELLIS HENICAN, SR., ET AL

No. **CA-8908**